Supreme Court, U.S.
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No. 93-854

In The

Supreme Court of the United States

October Term, 1993

ALFRED E. HARMON, JR.,

Petitioner,

versus

NORTHERN INSURANCE COMPANY OF NEW YORK AND ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Mississippi

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether liability insurance proceeds are property of a debtor's estate in bankruptcy as a matter of law.

2. Whether Section 525 of the Soldiers' and Sailors' Civil Relief Act, which tolls statutes of limitations for actions by or against persons in military service, also tolls the time period for a plaintiff in military service to appeal the dismissal of his tort action.

PARTIES TO THE PROCEEDING

The Parties to the Proceeding are correctly set forth in the Petition.

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Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Mississippi

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Northern Insurance Company of New York and St. Paul Fire & Marine Insurance Company, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Mississippi Supreme Court's opinion in this case reported at 621 So. 2d 938 (Miss. 1993), and its unreported opinion in this case dismissing Petitioner's Petition for Rehearing.

OPINIONS DELIVERED BELOW, JURISDICTION AND FEDERAL STATUTORY PROVISIONS INVOLVED

The Opinions Delivered Below, Jurisdiction, and Federal Statutory Provisions Involved are correctly set forth in the Petition.

STATEMENT OF THE CASE

Petitioner's Statement of the Case confuses and omits numerous material facts. Petitioner, Alford E. Harmon, Jr., filed a Complaint against his father, Alford E. Harmon, Sr., and against his father's liability insurance carriers, Northern Insurance Company of New York (Northern) and St. Paul Fire and Marine Insurance Company (St. Paul), seeking damages in the amount of $12 million resulting from his father's alleged sexual abuse. Harmon, Sr. was never served with process, and the trial court never obtained personal jurisdiction over him. On June 9, 1989, Harmon, Sr. filed for protection under Chapter 7 of the Bankruptcy Code. Although Harmon, Jr. filed a Proof of Claim in the bankruptcy proceedings, he did not seek permission from the bankruptcy court to proceed with the prosecution of his lawsuit. On June 23, 1989, the trial court dismissed Harmon, Jr.'s action against Northern and St. Paul on the ground that Mississippi does not recognize a plaintiff's right to sue directly an insurance carrier. One year and three months later, on September 21, 1990, Harmon, Jr. filed a notice of appeal to the Mississippi Supreme Court. Northern and St. Paul filed a motion to dismiss the appeal, arguing that the notice of appeal was untimely since it was not filed within thirty days after entry of the trial court's

judgment. *See* Miss. Sup. Ct. R. 2(a)(1), 4(a). In response, Harmon, Jr. argued that his father's bankruptcy proceedings automatically stayed the time for filing an appeal against Northern and St. Paul until thirty days after he received notice of his father's discharge. Harmon, Jr. received notice of his father's discharge on August 31, 1990 and he filed his notice of appeal within thirty days from that date.

Under the unique facts of this case, the Mississippi Supreme Court found that the automatic stay provisions of the Bankruptcy Code did not apply to Harmon, Jr.'s action against Northern and St. Paul because the liability insurance proceeds did not constitute property of Harmon, Sr.'s estate. Accordingly, the Mississippi Supreme Court dismissed Harmon, Jr.'s appeal as being untimely.

On July 1, 1993, Harmon, Jr. filed a petition for rehearing in which he argued for the first time that the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. app. §§ 501-548, 560-591 (1988), tolled the prescribed time period for filing his appeal. On August 26, 1993, the Mississippi Supreme Court denied the rehearing petition without issuing a written opinion.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Decision of the Mississippi Supreme Court does not Conflict With the Prevailing View of the United States Courts of Appeals

The Mississippi Supreme Court found that the proceeds from the insurance liability policies issued by

Northern and St. Paul did not constitute property of Harmon, Sr.'s estate in bankruptcy. Based on the facts of this case, the Mississippi Supreme Court's decision in this regard is consistent with the decisions of the United States Courts of Appeals and therefore does not merit review by this Court.

Harmon, Jr. does not contend that Harmon, Sr. actually tendered the insurance policies or any insurance proceeds into the bankruptcy estate or that any insurance proceeds from these policies were actually distributed as a part of the Chapter 7 liquidation. Rather, Harmon, Jr. contends that the proceeds constituted part of Harmon, Sr.'s bankruptcy estate as a matter of law and that, consequently, 11 U.S.C. § 362(a)(3) automatically stayed any action to obtain those proceeds, thus tolling the time for filing his appeal.

"Property of the estate" is defined in 11 U.S.C. § 541(a) as including all legal or equitable interests of the debtor in property. However, 11 U.S.C. § 541(d) provides:

> Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, . . . becomes property of the estate . . . only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

Id. In other words, the estate's legal and equitable interests in property can rise no higher than those of the debtor. Thus, the estate in bankruptcy may only include property to which the debtor would have had a right if the debtor were solvent. *See In re Louisiana World Exposition, Inc.*, 832 F.2d 1391, 1401 (5th Cir. 1987). The question

thus becomes whether Harmon, Sr. had an interest in the insurance proceeds; if not, then the filing of a petition in bankruptcy did not create one.

The Fifth Circuit Court of Appeals addressed this issue in some detail in a decision rendered at about the same time as the present case. Under facts similar to this one, the Fifth Circuit in *In re Edgeworth*, 993 F.2d 51 (5th Cir. 1993), held, as did the Mississippi Supreme Court, that insurance proceeds did not constitute property of a Chapter 7 bankruptcy estate as a matter of law. *Id.* at 55-56. In reaching this conclusion, the Fifth Circuit recognized that insurance policies are generally characterized by most courts as property of the debtor's bankruptcy estate because, regardless of who the insured is, the debtor retains certain contract rights under the policy itself. The Mississippi Supreme Court did not, as Harmon, Jr.'s petition implies, reach a contrary holding. However, both the Fifth Circuit in *Edgeworth* and the Mississippi Supreme Court in this case determined that ownership of an insurance policy does not resolve the question as to whether insurance proceeds are property of the bankruptcy estate. Instead, the overriding question is whether the debtor would have a right to receive and keep the insurance proceeds when the insurer paid on a claim. As the Fifth Circuit in *Edgeworth* explained:

> When a payment by the insurer cannot inure to the debtor's pecuniary benefit, then that payment should neither enhance nor decrease the bankruptcy estate. In other words, when the debtor has no legally cognizable claim to the insurance proceeds, those proceeds are not property of the estate.

Id. Likewise, the Mississippi Supreme Court arrived at the same conclusion after determining that "Harmon, Sr. was never entitled to the proceeds from the liability policies he purchased from Northern and St. Paul." *Harmon*, 621 So. 2d at 942.

Furthermore, the Mississippi Supreme Court appropriately distinguished the present case from those lines of cases, often called the *Manville-Robins* line of cases, in which the property of the debtor's estate was held to include the debtor's insurance contracts as well as the proceeds therefrom. Harmon, Jr. cites these cases in support of his Petition but fails to mention this distinction in an attempt to create a conflict where none exists. In this line of cases, the corporate debtors were driven into Chapter 11 bankruptcy by massive product liability exposure, and the motivating factor behind the Chapter 11 reorganization was the debtor's need for relief from its tort liability. In the two cases from which this line of cases obtained its name, *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986), and *In re Johns-Manville Corp.*, 26 B.R. 405 (S.D.N.Y. 1983), both debtors were beset by a mass of suits seeking large damage awards for injuries sustained as a result, respectively, of an intrauterine contraceptive device known as the Dalkon Shield and of asbestos exposure. In these unusual cases, the courts stayed lawsuits filed against the corporate debtors' insurers, given that the debtors' insurance coverage was insufficient and that to allow the suits to proceed against the insurers would unfairly favor earlier judgment holders and deplete the proceeds available to satisfy other tort claims. *See also Tringali v. Hathaway Machinery Co.*, 796 F.2d 553 (1st Cir. 1986) (staying tort

suit against bankrupt manufacturer where multiple claims were pending or expected); *Forty-Eight Insulations, Inc. v. Lipke*, 54 B.R. 905 (Bankr. N.D. Ill. 1985) (staying suit brought in state court against insurers of debtor based on liability for its asbestos products where judgments could quickly exceed policy limits); *In re Johns-Manville Corp.*, 40 B.R. 219 (Bankr. S.D.N.Y. 1984) (affirming bankruptcy court's stay of state court proceedings where creditors' claims totaled more than $2 million, exceeding both debtor's insurance policy and entire net worth).

These policy concerns are not present in this case. First, Harmon, Sr. filed for Chapter 7 bankruptcy, under which assets are liquidated and distributed and the debtor is not reorganized. Second, Harmon, Jr. was aware of the pendency of his father's bankruptcy proceeding. The insurance proceeds, however, were never considered part of the bankruptcy estate and no claim was made against those proceeds in the bankruptcy court. Third, because Harmon, Jr. is the sole claimant to the liability insurance proceeds, there is no threat of an inequitable distribution of the policy proceeds. All of these factors distinguish the present case from the *Manville-Robins* line of cases.

The Mississippi Supreme Court appropriately recognized this distinction in rendering its decision holding that the insurance proceeds were not property of Harmon, Sr.'s bankruptcy estate. This decision is consistent with that reached by the Fifth Circuit Court of Appeals in *Edgeworth* and with the decisions of other jurisdictions. *See also First Fidelity Bank v. McAteer*, 985 F.2d 114, 118 (3d Cir. 1993)(proceeds of credit life insurance policy was not

property of debtor's estate); *In re Goodenow*, 157 B.R. 724, 726 (Bankr. D. Me. 1993)(proceeds of credit disability insurance were not property of debtor's Chapter 13 estate); *In re Correct Manufacturing Corp.*, 88 B.R. 158, 161-62 (Bankr. S.D. Ohio 1988)(proceeds of liability insurance were not property of Chapter 7 debtor's estate). Furthermore, other courts besides the Fifth Circuit have declined to follow the *Manville-Robins* line of cases under similar facts. For example, in an action involving a claim to policy proceeds made by a single creditor in a direct action in state court against the debtor's insurer, the Eighth Circuit Court of Appeals in *In re Titan Energy, Inc.*, 837 F.2d 325, 330 (8th Cir. 1988), held that the *Manville-Robins* line of cases were factually distinguishable for two main reasons: (1) numerous creditors claimed entitlement to a debtor's insurance proceeds and (2) the debtor intended to resume business after its Chapter 11 reorganization proceedings. Likewise, in *In re Fernstrom Storage & Van Co.*, 100 B.R. 1017, 1022-23 (Bankr. N.D. Ill. 1989), the court held that the *Manville-Robins* line of cases did not apply where there was no threat of inequitable distribution of policy proceeds and where the debtor did not seek a Chapter 11 reorganization. These decisions are based on good sense and sound policy considerations.

Nevertheless, the Petitioner, Harmon, Jr. attempts to discredit the distinction reached by the Mississippi Supreme Court by pointing out irrelevant factual differences between the present case and one of the cases which it cites in support of its decision, *In re Fernstrom Storage & Van Co.*, 938 F.2d 731 (7th Cir. 1991). By contending that the Supreme Court erred in applying the distinction, Harmon, Jr. implicitly recognizes that there

are cases in which the distinction should apply. In any event, if the Mississippi Supreme Court was wrong in applying the distinction in this case, then its decision reflects simple error and does not create an intolerable ambiguity in federal law.

Finally, Plaintiff claims that his father's bankruptcy placed him between the proverbial "rock and a hard place" in that his appeal of the trial court's judgment would have violated the automatic stay and yet his failure to do so resulted in the dismissal of his appeal as being untimely. However, Harmon, Jr. could have easily avoided this situation by asking the bankruptcy court for permission to prosecute his appeal, an option which he freely admits he considered but ultimately chose not to do.

In the end, despite Plaintiff's assertions to the contrary, the Mississippi Supreme Court has not decided a federal question in a way that conflicts with the decisions of the United States Courts of Appeals. The Mississippi Supreme Court held that under the facts of this case where there was no mass tort litigation, where the debtor had filed for Chapter 7 consumer bankruptcy, and where the insurance proceeds did not inure to Harmon, Sr.'s benefit, the proceeds were not property of Harmon, Sr.'s bankruptcy estate. This holding is consistent with the decisions of other courts in cases under similar facts. To reverse the Mississippi Supreme Court's decision would confuse the law where no confusion now exists.

In any event, this is not a proper case for deciding the sole question raised by the Petitioner because the Mississippi Supreme Court has recently issued a decision

which conclusively resolves the substantive merits of Harmon, Jr.'s appeal. In *Ford v. State Farm Insurance Co.*, 625 So. 2d 792 (Miss. 1993), the Mississippi Supreme Court held that the Louisiana Direct Action statute was procedural in nature and, therefore, was inapplicable in Mississippi. Accordingly, Harmon, Jr.'s appeal is now wholly meritless. Thus, even if this Court reverses the Mississippi Supreme Court and finds that Harmon, Jr.'s appeal was timely because of the automatic stay provisions of the Bankruptcy Code, it would make no difference to the outcome of this case since Harmon, Jr.'s appeal would be summarily dismissed under *Ford*.

2. The Mississippi Supreme Court's Refusal To Reconsider Its Decision in View of the Soldiers' and Sailors' Relief Act Does Not Present an Issue Worthy of Certiorari

The Petitioner, Harmon, Jr. insists that the Mississippi Supreme Court erred in denying his petition for rehearing in which he argued for the first time that the Soldiers' and Sailors' Relief Act (SSCRA), 50 U.S.C. app. §§ 501-548, 560-591 (1988), tolled the prescribed time period for filing his appeal. The Mississippi Supreme Court did not issue a written opinion explaining its decision, although for the reasons discussed below, its decision was eminently correct.

Harmon, Jr. enlisted in the United States Navy in December, 1986, and from that date forward has remained an active member of the military. Section 525 of SSCRA states, in part:

> The period of military service shall not be included in computing any period now or

> hereafter to be limited by any law . . . for the *bringing* of any action or proceeding in any court . . . by or against any person in military service . . . .

50 U.S.C. app. § 525 (emphasis added). Harmon, Jr. does not argue that the SSCRA tolled the time period for bringing this action but, rather, that it tolled the period for perfecting his appeal. However, the 30-day time period for filing a notice of appeal is not a statute of limitations but, rather, is a rule of the Mississippi Supreme Court, and Section 525 applies only to statutes of limitation, not to other prescribed time limits. *See, e.g., Zitomer v. Holdsworth*, 449 F.2d 724, 725-26 (3d Cir. 1971) (§ 525 of SSCRA tolls statute of limitations during period of military service and has no applicability to action duly filed and served within statute of limitations).

Harmon, Jr. brought this action when he was an active military serviceman; in the absence of some change in status, which he has not alleged, he cannot complain that his service in the Navy actually prevented him from perfecting his appeal. Moreover, Harmon, Jr. could have asked the trial court for relief pursuant to § 521 of the SSCRA which authorizes a state court, either on its own motion or upon application by a service member, to stay a civil court action at any stage of the proceedings. However, he chose not to do so.

In any event, this issue is not worthy of certiorari review. It does not present any important federal question and does not afford an opportunity to explore the Mississippi Supreme Court's views where none was expressed.

CONCLUSION

Petitioner, Harmon, Jr., contends that the Mississippi Supreme Court erred in distinguishing this case – involving a single injured plaintiff and a Chapter 7 debtor – from those line of cases involving mass tort litigation and a bankrupt corporate defendant seeking a Chapter 11 reorganization. However, the distinction recognized by the Mississippi Supreme Court does not conflict with the majority of those decisions rendered by other jurisdictions and does not otherwise present an important question of federal law. Finally, no novel issue has arisen with regard to the Mississippi Supreme Court's refusal to apply the SSCRA and the Petitioner does not state otherwise in his petition. For these reasons, Respondents respectfully request this Court to deny the Petition for a writ of certiorari.

This the 21st day of January, 1994.

Respectfully submitted,

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